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ABSTRACT

A study used a communication perspective to examine the extent to which the civilian/military First Amendment dichotomy is warranted and to add to First Amendment theory the subject of the First Amendment rights of servicemembers. The study was limited to the freedoms of speech, press, assembly, petition, and association. It did not include freedoms of religion or privacy, the rights of gay servicemembers, or the right not to register for the draft. Traditional legal research methods were used to uncover the legal rationales that support the civilian/military dichotomy. All the military speech cases from all levels of the military appeals courts and the federal civilian courts were examined. Also examined were the congressional debate over the adoption of the Uniform Code of Military Justice and three unlitigated military speech controversies from the post-Vietnam period. Results indicated that civilian and military courts have used the following four rationales which suggest that military speech must be curtailed if it threatens: (1) the political neutrality of the armed forces; (2) servicemembers' loyalty and morale; (3) strict order, discipline, and obedience in the military; and (4) diplomatic relations. Findings support the conclusion that military society is viewed by the courts as substantially different from civilian society. A communications model is suggested in which military communications is a discrete, linear process that can be stopped and the purpose of which is usually persuasive. (One hundred forty-six footnotes and two diagrams are attached.) (RS)

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FREEDOM OF EXPRESSION IN THE AMERICAN MILITARY:
A COMMUNICATION MODELING ANALYSIS

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The U.S. Supreme Court declared in 1974 that servicemembers are protected by the First Amendment.¹ However, that decision has failed to quell a small but persistent debate about the level of First Amendment protection that should be afforded soldiers. The debate continues because the Court said in Parker v. Levy (1974), its landmark case on the First Amendment rights of servicemembers:

While members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of these protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.²

The result is that many of the expressive activities in which civilians routinely engage are illegal for servicemembers. This is effectuated primarily by the military legal code -- the Uniform Code of Military Justice (UCMJ) -- and the military courts. However, some military criminal cases do come to the civilian courts on petitions for writs of habeas corpus filed by servicemembers challenging the limitations placed on their First Amendment rights by the military.

The precept that free expression threatens a variety of military interests has gone largely unexamined. Military lawyers and a few civilian legal scholars have conducted a heated but discursive debate on the First Amendment rights of military personnel. Most of their attention has been narrowly focused on the application of a handful of articles of the UCMJ used to curtail servicemembers' expression and on the outcomes of several major court cases. Most First Amendment theorists have generally either ignored military speech altogether or have conceded that it is a special case without probing why and to what extent it deserves a different level of First Amendment protection than civilian speech. Also, the subject of military expression has rarely been addressed as a communication problem, despite the failure of more traditional legal and historical approaches to

resolve the controversy.

The proper level of First Amendment protection for servicemembers continues to receive attention, however, because it continues to be an important question -- both to military leaders, to servicemembers, and to civil libertarians. From the military viewpoint, communication is necessary in order for a military mission to succeed,³ yet certain types of communication might imperil that same mission.⁴ The line between constructive and destructive communication remains unclear. From the viewpoint of civilian First Amendment theory, free expression is crucial to the self-fulfillment of individuals and to the operation of this nation's democracy.⁵ However, only a very few First Amendment theorists have ever advocated absolute First Amendment rights for any group of citizens, much less soldiers. Again, the line between what should and should not be allowed to be expressed often is unclear. The purpose of this study is twofold. First, its purpose is to place the subject of free expression for servicemembers in a communication context in order to see more clearly the existing civilian/military First Amendment dichotomy and to suggest the extent to which it is warranted. The second purpose is to add a missing link to First Amendment theory so the subject of the First Amendment rights of servicemembers is no longer left neglected outside the mainstream of legal thought and study. This study is based on the assumption that military expression is, in fact, a communication problem and is conducted in the belief that a communication perspective can provide new and broader insights into this subject. To that end, this study uses and constructs models of communication, the explanatory and organizational powers of which are sorely needed in this area.

Questions for Research

Several broad research questions are raised and addressed in this study.

1. What are the legal rationales that support the civilian/military freedom of expression dichotomy?

2. What communication model or models are suggested by the legal rationales used to justify the civilian/military freedom of expression dichotomy?

3. What are the strengths and weaknesses of the military communication model?

4. Is there room for another military communication model that might permit greater latitude for freedom of expression while still meeting military needs? What might that be?

This study is limited to those First Amendment rights that most directly involve communication – the freedoms of speech, press, assembly, petition, and association. It does not address freedom of religion or privacy, the rights of gay servicemembers – their sexual preference, or the right not to register for the draft. The primary historical focus of this study is on the period since the UCMJ went into effect in 1951.

Methodology

This study uses traditional legal research methods to uncover the legal rationales that support the civilian/military First Amendment dichotomy. All the military speech cases from all levels of the military appeals courts – the only military courts that render reported, written decisions – and the civilian federal courts have been examined. Also, the congressional debate over the adoption of the Uniform Code of Military Justice and three unlitigated military speech controversies from the post-Vietnam period have been examined using government documents and secondary sources.⁶ In addition, secondary sources provide an overview of models that have been constructed to illustrate how the communication process works and a discussion of how communication works in the military, in particular.

This study explicates the model of military communication suggested by the legal rationales supporting the civilian/military First Amendment dichotomy. It also constructs a model to summarize what is currently known about how the communication process works and with what results. Then this

study assesses the strengths and weaknesses of the traditional military communication model, using case law, the literature on military communication, and the summary communication model.

For the purposes of this research, models are graphic depictions of the communication process. However, models have been used in many academic disciplines, including economics, psychology, and the physical sciences. In a 1952 article on the use of models in the social sciences, Karl Deutsch said, "Models ... are indispensable for the understanding of more complex processes."⁷ More specifically, Deutsch said models serve four relatively distinct functions: organizational, heuristic, predictive, and measurative. By organizing, Deutsch said, "is meant the ability of a model to order and relate disjointed data, and to show similarities or connections between them which have previously remained unperceived."⁸ The heuristic value of the model is that it may lead the researcher to the discovery of new information. A model is predictive if it allows a researcher to predict the nature or effect of a process such as communication. And models become related to measurement if they are modeling clearly understood processes.⁹

The major criticism of models is that they may oversimplify and cause researchers to lose sight of the complexity of a given process.¹⁰ By definition, models simplify. Models eliminate certain details in order to focus on essential functions.¹¹ Simplification becomes oversimplification, however, when crucial variables and recurrent relationships are ignored.¹² Critics of models also say they are too easily confused with reality¹³ and that they may limit future exploration of an area by trapping their originators and users within rather limited confines that they seem eager to defend against attack.¹⁴

Many scholars, however, agree models serve a legitimate purpose in the study of communication processes. Communications scholar Joseph A. DeVito, for example, noted that one of the best ways to "examine the essential elements, exclude irrelevant ones, and visualize important processes" of communication, "man's most complex activity," is to construct models.¹⁵ In order to avoid

the problem of oversimplification, this study lists the assumptions about the communication process that underlie each of the models constructed.

The Separate Military Society

Any analysis of servicemembers' First Amendment rights or military communication must begin with a discussion of the separate society rationale used by the military establishment and the military and civilian courts to curtail free expression in the military in ways that are not allowed in civilian society. The separate society rationale is the foundation of four more explicit legal rationales for abridging the First Amendment rights of military personnel. The separate society also is accepted by the military and the judiciary as the context of all military communication and thus the foundation of all assumptions about how communication works in the military and the traditional military communication model suggested by this study. The separate society rationale was stated most clearly by Justice William Rehnquist in the landmark case of Parker v. Levy (1974). Writing for the Court, Rehnquist said,

The Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."¹⁶

This view that the military is separate from and different than civilian society sometimes is explicitly stated, as above. Other times it is a less clearly stated rationale for applying different constitutional standards to civilian and military society. For example, 20 years before Parker v. Levy, in United States v. Voorhees (1954), Judge George W. Latimer of the U.S. Court of Military Appeals defended the differential application of the First Amendment to civilians and soldiers with this

contention:

What may be questionable behavior in civilian society, and yet not present any danger to our form of Government, may be fatal if carried on in the military community.¹⁷

Not only is the military widely viewed as separate from and different than civilian society. It also is viewed by the military and the U.S. Congress as different than paramilitary organizations like firefighting and police forces and even European armies. Although the civilian courts have declared that police and firefighters cannot constitutionally be denied the right to belong to labor unions and in doing so have suggested similarities between the paramilitary and military societies,¹⁸ the military denies that they are comparable. The Department of Defense's General Counsel argued in a law review article on military unionization that soldiers on strike would pose a greater threat to society than striking police officers or firefighters. The DOD attorney explained,

If police officers or firemen go on strike, only the local community is threatened, whereas if the armed services or a large or critical portion thereof were to go on strike, the survival of the nation might be endangered, as well as the survival of the nations that depend upon the military power of the United States for protection.¹⁹

Also during the congressional debate that preceded passage of legislation prohibiting military unionization, a critic of public employee unions said comparing European armies, some of which are unionized, to the U.S. military "is like comparing apples to oranges" because of their different strategic roles.²⁰ He explained, in part,

First of all, the defense of the free world does not rest on the shoulders of the Swedes or Danes.... It is the United States that is expected to defend the free states of the world when attacked. It is the United States that is the glue of NATO. Without our presence in Europe, the Warsaw Pact would not hesitate to move West.²¹

Some of the characteristics of this unique and separate U.S. military society are stated explicitly in the case law and related literature, while others are implied. The separate military society has five primary characteristics.

The first of those characteristics is that the military has the unique mission of waging war

successfully. In the legislative debate over adoption of the UCMJ and in the post-1951 military speech court cases and controversies reviewed for this study, this characteristic is repeatedly used by military leadership and by the courts to distinguish military society from civilian society. For example, military law scholar Frederick Bernays Wiener testified during the congressional debate on the UCMJ,

The object of a civilian government is to enable people to live together in peace and reasonable happiness. The object of an army is to win wars. Not just to fight wars, but to win them.²²

Also at those hearings, Representative Carl Vinson (Democrat-Georgia) said the fundamental difference between military and civilian society explained why the proposed UCMJ was in the armed services committee rather than the judiciary committee. He said, "The objective of the civilian society is to make people live together in peace and in reasonable happiness. The object of the armed forces is to win wars."²³

In United States v. Voorhees (1954), the first military speech case to squarely raise First Amendment issues, Judge Latimer of the Court of Military Appeals said military censorship cases should be evaluated by balancing the soldier's interest in expressing himself against the right of the government to pursue war to a successful conclusion. He said that "military units have one major purpose justifying their existence: to prepare themselves for war and to wage it successfully."²⁴ In 1974 in Parker v. Levy, Justice Rehnquist declared, as noted above, that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."²⁵ During the debate on military unionization, Senator Strom Thurmond (Democrat-South Carolina) argued that while unions are beneficial to civilian society they would be disastrous to the very different military society. One of the ways in which military society is different, he explained, is that its members may have to face an enemy in battle.²⁶

A second characteristic of the separate military society is that because the threat of war is always imminent, the military does not have time to allow the marketplace of ideas to work, that is, to allow soldiers to send and receive all ideas en route to discovering the truth, before it makes

decisions. Also, it cannot distinguish between combat and non-combat troops or between wartime and peacetime in matters affecting military efficiency. For example, Wiener testified at the congressional hearings on the UCMJ that there often is no time for discussion and deliberation in the separate military society:

We have representative government in our country, down to the level of town councils; we feel that with discussion and deliberation we are more apt to reach a sound result. But in an army it is often necessary to sacrifice wisdom of decision for the sake of having a decision at all. Better speedy action, now, when it is likely to succeed, than the best action a week hence, when it may well fail for being too late. A battle cannot be fought nor an invasion mounted with the leisurely debate and argument that sees an important policy enacted into law.²⁷

Also, Chief Judge Robert E. Quinn stated in United States v. Voorhees (1954) that the threat of war does not allow time for debate among the armed forces. He said the prior restraint in question in that case was constitutional because in the military "one false move could be disastrous, even fatal." He said, "Prevention rather than punishment becomes necessary to protect and preserve the lifeline of the republic in the theatre of military operations."²⁸ Judge Latimer agreed. He said the marketplace of ideas theory does not work in military society because it requires time -- time the military does not have:

In training a civilian army, time is of the essence. A war cannot be won in the halls of debate, and conditions do not permit meeting lies with the truth. A syndic preaching syndicalism to servicemen can hardly be neutralized by a patriot teaching patriotism.... one false rumor, timed properly, may destroy an army.²⁹

Furthermore, in this separate society, every person at every time and place must be prepared to do battle to protect the nation. Judge Latimer declared clearly in United States v. Voorhees (1954) that the military's need to curtail expression was as strong in peacetime as in wartime because in peacetime the nation must be preparing for war.³⁰ For the same reason, trainees must be single-minded in their training and can be protected from potentially distracting political speeches on base, the U.S. Supreme Court declared in Greer v. Spock (1976).³¹ Also, in United States v. Daniels and United States v. Harvey (1970), the Court of Military Appeals upheld the courts-martial of soldiers who counseled

other soldiers to seek administrative remedies to avoid being shipped to Vietnam, although those soldiers had not yet received their orders.³² In Cortright v. Resor (1972), the Court of Military Appeals approved the transfers of soldiers who had protested the Vietnam War while playing in a military band in a July Fourth parade. The court granted the military "a large scope" in protecting the effectiveness of military units to perform their tasks – "even such a relatively unimportant one as a military band's leading a Fourth of July parade"³³ Levy was punished for speaking out against the Vietnam War while working as a dermatologist in a South Carolina military clinic.

The third characteristic of the separate military society is that the military is a non-democratic organization in which instant and unquestioning obedience is both possible and necessary to the military mission. Wiener testified at the UCMJ hearings,

... the underlying concept of an army is obedience. And while an army composed of literate free men can be led in large measure by precept, example, and exhortation, there is always a large irreducible minimum who respond only to fear. It is only through punishment and the fear of punishment that this last group and many in the indifferent group can be made to obey The army not only wants its men to refrain from striking each other, it wants them all to march in one prearranged direction.... Regimentation? Of course it is, but how can you mount a D-Day invasion without regimentation?³⁴

In Parker v. Levy (1974), Justice Rehnquist wrote,

"An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."³⁵

The same sentiment was expressed by those opposed to military unions. Representative Robin L. Beard (Republican-Tennessee) testified before a congressional committee,

It may be harsh to say, but the military cannot be a totally democratic system. It must be one where discipline is the highest priority, and unions, by their very nature, would undermine that sense of discipline.³⁶

The director of the national security division of the American Legion agreed. He argued that a military unit could not operate as a democracy and added that total obedience by every soldier is

necessary to military success:

A foxhole, a ship in combat, or a bomber on a tactical mission are not places conducive to the democratic process. The very survival of a soldier, sailor or airman engaged in combat is dependent upon each man's instant and unquestioning obedience to orders from his commander. A military commander, therefore, seeks to achieve good order, discipline, and obedience at all times from all personnel ³⁷

These are explicit references to the military as a non-democratic society requiring total obedience from its members. Elsewhere in the case law this characteristic of the separate military society is not clearly stated but is implicit in the administration of military law, often because of what is not said. For example, in civilian cases the courts frequently proclaim the beneficial effects of free expression -- which often takes the forms of disagreement and/or disobedience -- in a democracy. Those beneficial effects include creating "a more capable citizenry and more perfect polity,"³⁸ preventing government "from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell,"³⁹ insuring that the government will be responsive to the will of the people⁴⁰ and that social change will be peaceful,⁴¹ and correcting bureaucratic errors.⁴² The fact that none of these effects is viewed as beneficial to military society suggests that the military is not viewed as a democracy. Also, it is significant that military spokespersons and the courts never question whether absolute obedience is a realistic expectation.

The fourth characteristic of the separate military society is that soldiers are motivated to risk their lives in battle because they are trained to obey orders and instilled with loyalty to their country and commanders. This is a theme that runs throughout the legal materials reviewed in this study. Obedience and allegiance are required of all soldiers to insure the success of the military mission, and disobedience or attempts to undermine the loyalty and obedience of soldiers to their command are punished by the Uniform Code of Military Justice and other military regulations. Under Secretary of the Navy W. Jon Kennedy testified at the UCMJ hearings,

In order to be effective in carrying out the assigned responsibility of a military force -- success in battle -- good discipline is essential. The element of discipline is an

intangible; it is that impalpable factor which distinguishes a crack outfit from a mediocre one.

The existence of discipline depends in large measure upon the amount of respect which the personnel of the unit have for the commanding officer – respect for his ability, his fairness, and his authority.⁴³

Also, the government explained in its brief in the case of Secretary of the Navy v. Avrech (1974),

The making of disloyal statements, with the intention of promoting disloyalty and disaffection among the troops or interfering with and impairing their loyalty, morale and discipline, is a serious breach of military discipline. It is one which, unless promptly punished, creates a real danger of impairing the effectiveness and readiness of the armed forces to perform their military mission. Its seriousness is reflected in the fact that the table of maximum punishments permits confinement at hard labor of up to three years ⁴⁴

Senate Armed Services Committee Chairman Senator John C. Stennis (Democrat-Mississippi) opposed military unions on the grounds that they would divide soldiers' allegiance and thus jeopardize the military mission. He said,

... a military commander has to claim, and, in fact, demands the total allegiance of all its members. There is no room left for another allegiance.... after all, a sense of personal duty to a higher command is the bedrock formation ... of any military organization.⁴⁵

Similarly, the director of the National Legislative Service of the Veterans of Foreign Wars predicted unions would undermine military discipline and thereby impair the will and ability of soldiers to fight:

As we all know, the only difference between a mob and an Army is discipline and leadership. Unionism would not only have a deleterious effect on the morale, discipline, esprit de corps, and combat readiness of our Armed forces, but could well destroy the will and ability of combat forces to carry out quick response which may be necessary in the future.⁴⁶

Secretary of the Navy W. Graham Clayton, Jr., expressed concern that military unions would,

... severely decrease the ability of the ship to operate as an effective military unit where, in effect, you have to say, "Do it now and don't bother me with questions and details, your instructions were to do it now."⁴⁷

Senator Thurmond said,

To sum up, an effective defense force is built and maintained upon a foundation of discipline, patriotism, command authority, and quick responsiveness. This foundation cannot exist with loyalty divided between the chain of command and a union.

... When our men are called upon to defend the country, a commander must have the unquestioned authority to order them into battle and the power to enforce his order. Any action that would weaken this power and authority would amount to a self-inflicted wound to our defense effort ⁴⁸

The fifth characteristic of the separate military society is that there is effective two-way, vertical communication through official military channels. This was particularly clear in the 1970's congressional debate over military unionization. Much of the debate focused on the effectiveness of military procedures for discerning and responding to the complaints of enlisted personnel. For example, Army Chief of Staff Bernard W. Roberts told Congress the Army has open-door policies for its commanding officers, surveys its enlisted personnel, and sponsors a variety of publications to help enlisted personnel voice their complaints. Roberts said unions, therefore, were not needed to represent servicemembers in their dealings with the military command.⁴⁹

Within the separate military society described above, four legal rationales are used to justify abridging the First Amendment rights of military personnel. Those rationales, which are articulated in the case law, congressional debates, and scholarly literature on military speech reviewed as part of this research, are:

1. The military must remain politically neutral. Civilian control over the military, which is mandated in Article 1 of the U.S. Constitution, must be protected against military encroachments, including a possible military coup.
2. Servicemembers' loyalty and morale must be maintained at a high level or they either may not fight effectively or may refuse to fight at all.
3. Strict order, discipline, and obedience must be maintained if a military force is to respond promptly and perform efficiently in armed conflict.
4. Foreign diplomatic relations must be protected against the appearance of dissension in the ranks of the U.S. armed forces.

The Traditional View of How Military Communication Works

Implicit in the legal rationales for curtailing the expressive activities of soldiers are these four assumptions about how communication works in the separate military society:

1. Communication is a discrete, linear process with a beginning and an end. It can be stopped.
2. The purpose of communication usually is persuasive.
3. Communication has powerful, direct, and predictable effects.
4. The communication process works the same way regardless of who is communicating and regardless of the context in which the communication process occurs.

Sometimes these assumptions are stated explicitly in the case law, congressional testimony, and the related literature. Other times the assumptions are implicit. One implicit assumption is that communication is a discrete, linear process with a beginning and an end and that it can be stopped. This assumption is implicit in the military's punishment of expressive activities under the UCMJ for the reasons articulated in the legal rationales listed above. In all the military speech cases and controversies, communication is viewed as a very simple process in which one soldier sends a message to another soldier or soldiers. It is assumed that strict military discipline can prevent this process from beginning or stop it once it has begun.

Second, implicit in the legal rationales is the assumption that the purpose of communication usually is persuasive. The legal rationales suggest that the purpose of communication frequently is to persuade soldiers to adopt a certain political view, to persuade soldiers to disobey orders and/or to refuse to fight, or to persuade foreign diplomats to change their opinions about U.S. military goals. No possible non-persuasive purpose is acknowledged by the military or the courts.

Much more explicit in several of the legal rationales and their application is the assumption that communication has direct, powerful, and predictable effects. For example, the first legal rationale for curbing speech is that the military must remain politically neutral to preserve civilian

control over the military. The leading case in which this rationale was used was United States v. Howe (1967). In that case, the Court of Military Appeals upheld the conviction of Second Lieutenant Howe for publicly criticizing President Lyndon Johnson and his Vietnam War policy at an anti-war rally in Texas. Howe, who was off-duty and out of uniform, was convicted under Article 88 of the UCMJ, which proscribes an officer's use of contemptuous words against the President, and Article 133, which proscribes conduct unbecoming an officer and a gentleman. The Court of Military Appeals ruled that Howe's anti-war protest presented a clear and present danger to the discipline of the armed forces and thus that his use of contemptuous words against the President both undermined military discipline and threatened to undermine civilian control of the military. The court made no serious attempt to argue Howe was indeed plotting to subvert civilian supremacy over the military. However, the court was unwilling to risk Howe's becoming "an entering wedge for incipient mutiny and sedition."⁵⁰

Implicit in the legal rationale that servicemembers' loyalty and morale must be maintained at a high level or they either may not fight effectively or may refuse to fight at all is the assumption that speech has the powerful, direct, and predictable effect of undermining soldiers' loyalty and morale. For example, in United States v. McQuaid (1952), the Court of Military Review upheld a soldier's court-martial on three counts of violating UCMJ Article 134, which prohibits "all disorders and neglects to the prejudice of good order and discipline" and "all conduct of a nature to bring discredit upon the armed forces." The soldier had posted at several locations on an Alaskan base statements proclaiming that the Korean War was "a sordid story of Wall Street imperialism," praising the Soviets, and urging his fellow servicemembers to "follow the dictates of their own conscience."⁵¹ Despite the fact that there was no evidence that McQuaid's statements had created disloyalty and disaffection among the troops, the court assumed his statements had that effect. The court said his statements,

... tend to discourage faithful service to the country by members of the armed forces and unjustly malign our economic system.... Such false accusations are patently disaffecting

and disloyal as they tend to undermine the confidence by members of the armed forces in other members thereof.⁵²

In a second Korean War case, United States v. Bayes (1955), the Court of Military Review upheld the conviction of a soldier for aiding the enemy in violation of UCMJ Article 104 by expressing his support for the North Koreans in documents, recorded speeches, discussion groups, and classes while a prisoner of war. The court said his statements could be used by the enemy to "lessen the fighting effectiveness of troops, weaken their belief in their cause, make them believe themselves aggressors and murderers of innocent people, ... or destroy their will to escape in the event of capture"⁵³ Clearly the court viewed his speech as powerfully persuasive. Evidence of the government's assumption that a soldier's speech would undermine soldiers' loyalty and morale also appears in its brief to the U.S. Supreme Court in the case of Secretary of the Navy v. Avrech (1974):

The making of disloyal statements, with the intention of promoting disloyalty and disaffection among the troops or interfering with and impairing their loyalty, morale and discipline, is a serious breach of military discipline. It is one which, unless promptly punished, creates a real danger of impairing the effectiveness and readiness of the armed forces to perform their military mission. Its seriousness is reflected in the fact that the table of maximum punishments permits confinement at hard labor of up to three years.⁵⁴

Many other forms of dissident speech also were viewed by the military command and the courts as dangerous threats to servicemembers' loyalty and morale during the Vietnam War. They included an enlisted man's underground newspaper,⁵⁵ a protest by military band members during a Fourth of July parade,⁵⁶ the circulation of anti-war petitions in South Vietnam,⁵⁷ the wearing of one's uniform at a war protest,⁵⁸ holding a public meeting to discuss the Vietnam War,⁵⁹ writing a dissident letter in a company's log book,⁶⁰ and counseling soldiers not to go to Vietnam.⁶¹ In Locks v. Laird (1969), a U.S. District Court ruled that a soldier's wearing of his uniform at an anti-war meeting "constitutes such a flouting of elemental loyalty to the President and the officers appointed over petitioner that it cannot help but have some adverse and detrimental effect on the loyalty, discipline, morale and efficiency of the Armed Forces."⁶² In Dash v. Commanding General (1969), the district court posed the rhetorical question, "Can it be disputed that such a [anti-war] meeting held on post and directed particularly at

servicemen being trained to participate in that very war, would likely be calculated to breed discontent and weaken loyalty among such servicemen?"⁶³ In United States v. Daniels (1970), the Court of Military Appeals described the defendants' suggestion that soldiers use administrative remedies to avoid being shipped to Vietnam as "a subtle and skillful way of leading the black troopers in the company into insubordination and disloyalty."⁶⁴

Also, a major argument against military unionization was that a soldier's loyalty to a union would diminish his loyalty to his command. For example, Senator Thurmond testified before Congress,

... an effective defense force is built and maintained upon a foundation of discipline, patriotism, command authority, and quick responsiveness. This foundation cannot exist with loyalty divided between the chain of command and a union. Divide and conquer is one of the oldest maxims of war. Unionization of the American armed services would cause the enemies of freedom to rejoice all over the world.⁶⁵

Furthermore, the U.S. Supreme Court ruled that allowing soldiers to circulate petitions could undermine servicemembers' loyalty and morale.⁶⁶

The third rationale used to abridge servicemembers' freedom of expression is that strict order, discipline, and obedience must be maintained if a military force is to respond promptly and perform efficiently in an armed conflict. The assumption clearly is that communication causes soldiers to become disorderly, undisciplined, and disobedient. The UCMJ includes articles specifically designed to prevent or to halt this process. For example, the Court of Military Review in United States v. Hughens (1954) upheld the court-martial conviction of a sailor who had made a provoking gesture behind the back of a superior officer. Making such a gesture toward a superior officer, the court said, creates "discord and clamor" in the military organization.⁶⁷

During the Vietnam War, many more soldiers were court-martialed for communication activities the military claimed threatened the discipline, order, and obedience of the troops. For example, Levy's court-martial in Parker v. Levy (1974) was, in part, for "disorders prejudicial to good order and discipline." In its brief to the U.S. Supreme Court, the government argued that Levy's

statements in opposition to the war threatened to interfere with soldiers' responsiveness to command.

The government argued,

Intemperate, contemptuous and disrespectful remarks, such as Captain Levy's bragging to enlisted men that "the Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey," necessarily undercut "the effectiveness of response to command." The Army could not function effectively if its junior officers could thus flout the lawful orders of their superiors, and then broadcast their disobedience to men under their control.⁶⁸

The Court of Military Appeals ruled that Howe's anti-war protest and Daniels and Harvey's anti-war activities presented a clear and present danger to military discipline.

Also, Representative Beard argued to Congress that military unions would, "by their very nature," undermine military discipline.⁶⁹ He said he feared unions would attempt to control foreign policy or influence servicemembers to disobey the President and the Secretary of Defense.⁷⁰ In fact, Beard was just one of many witnesses who argued that servicemembers' association with military unions would divide servicemembers' loyalty and destroy their discipline, thereby jeopardizing combat effectiveness and national security. This is a disciplinary domino theory like that described in the literature by attorney John G. Kester.⁷¹ According to this view of how communication works, communication sets off a chain reaction of powerful and predictable effects. For example, Senator John G. Tower (Republican-Texas) said, "I can see nothing but breakdown in discipline, morale and combat effectiveness ahead of us if services are unionized, and I think that the union mentality, if imposed on the serviceman, could jeopardize the lives of individual servicemen."⁷² Furthermore, Secretary of Defense Brown and others argued that modern weapons technology had increased the need for soldiers to obey orders rapidly and without question because it reduced available reaction time.⁷³

Also, when the Defense Department in 1977 issued a memorandum to all commands discouraging the expression of personal views on military policy, it suggested the only possible effects of unrestricted communication were harmful effects. The memorandum said, in part, that "in almost no instance will the national interest be served by a military person voicing disagreement with established policy."⁷⁴

The circulation of petitions by soldiers was similarly regarded by the military and the Court. Justice Lewis Powell wrote for the Court in Brown v. Glines (1980), "The unrestricted circulation of collective petitions could imperil discipline."⁷⁵ And in Allen v. Monger (1978), a military petitioning case decided by the Ninth Circuit U.S. Court of Appeals, aircraft carrier crew members were not allowed to circulate petitions to Congress objecting to the planned movements of their ships because their commander said the petitions might "upset the morale and discipline of a green crew preparing for a new cruise."⁷⁶ The military also views servicemembers' involvement with extremist groups as a threat to military discipline. A Marine Corps commandant said he feared an individual soldier involved with such a group could "provoke disharmony by inflammatory words or actions."⁷⁷

Furthermore, implicit in the rationale that foreign diplomatic relations must be protected against the appearance of dissension or the expression of unauthorized opinions in the ranks of the U.S. armed forces is the assumption that unregulated military communication will have a direct, strong, and predictable effect on diplomatic relations. It is not clear precisely what that effect will be, although the military and the courts view the effect as interference with legitimate military/diplomatic goals. For example, the government argued in Carlson v. Schlesinger (1975) that allowing servicemembers to solicit signatures for anti-war petitions on Air Force bases in South Vietnam would adversely affect U.S. relations with the South Vietnamese.⁷⁸ And that same court, in Goldwasser v. Brown (1969), ruled that the military was justified in firing a civilian Air Force employee from his job teaching English to foreign military officers for discussing controversial religious, political, and racial topics and protesting the Vietnam War in class. The court said the situation "presents special problems affecting the national interest in harmonious relations."⁷⁹

President Truman was more explicit when he relieved General Douglas MacArthur of his command in 1951 for publicly criticizing U.S. military policy. He said MacArthur was "confusing our allies as to the true course of our policies"⁸⁰ In the case of U.S. Korean Forces Chief of Staff Major General John K. Singlaub, who was recalled from Korea for publicly criticizing President Carter's plans

to withdraw U.S. troops from South Korea in 1977, Carter said Singlaub's statements made him "an ineffective negotiator with North Korea."⁸¹

The fourth assumption about how military communication works -- again an assumption implicit in the legal rationales for abridging servicemembers' First Amendment rights -- is that the communication process works the same way regardless of who is communicating and regardless of the context in which the communication process takes place. The military and the courts that have decided military speech cases differentiate only two contexts in which communication takes place. One is civilian society. The other is the separate military society. There is no time or place within the separate military society when speech is viewed as less dangerous than at other times or places. Within the separate military society, communication always has powerful, direct, and predictable effects. This view is illustrated, in part, by the fact that the UCMJ applies to soldiers at almost all times and places. It applies both when the nation is at war and during peacetime. It also applies both in combat zones and in non-combat areas, including military bases and non-military locations in the United States.

In the Vietnam War military speech cases, for example, the military and the courts viewed the war as the context of the communication in question, whether the soldier was stationed in a battle zone, in the United States, or in an allied country. In its brief to the U.S. Supreme Court in Secretary of the Navy v. Avrech (1974), the government argued that the treatment of a soldier's disloyal statement must "depend upon all the surrounding circumstances in which it was made; ... the military setting in which the statement was made, and its likely effect upon the troops."⁸² Avrech was stationed in Da Nang in Vietnam in 1969. Also, in Carlson v. Schlesinger (1975), the D.C. Circuit Court of Appeals upheld the court-martial convictions of soldiers who solicited signatures for anti-war petitions on Air Force bases in South Vietnam without permission, saying the military commanders had struck a reasonable balance between "the legitimate combat zone needs of the military and the requested activity."⁸³ In Locks v. Laird (1969), a U.S. District Court ruled that an Air Force regulation that

prohibited servicemembers from wearing their uniforms at anti-war protests did not violate servicemembers' First Amendment rights. It said wearing uniforms at such gatherings "at a time of national emergency in which the nation is engaged in one of the costliest wars in our history in the number of lives lost, casualties otherwise sustained and resources expended," constituted a flouting of loyalty to a soldier's superiors.⁸⁴ Locks had participated in an anti-war demonstration in the United States. The context of the communication in Parker v. Levy (1974) was a military dermatology clinic in South Carolina, and Howe was punished for communicating his anti-war message in Texas. Dissident communication in the United States clearly was considered no less dangerous than in Vietnam.

In the military view, the need to curtail communication did not diminish when the war ended, either. In the post-Vietnam controversies, particularly the unionization debate, an explicitly stated assumption is that the security of the nation, and indeed, the entire free world, is constantly threatened by the Soviet Union. For example, in his study of military unions, Ezra S. Krendel expressed concern that military unions might cause the U.S. military command to hesitate, thus providing "an invitation to Soviet military adventures."⁸⁵

Just as the military assumes there are no meaningful differences between communication contexts within the separate military society, it assumes there are no meaningful differences between the senders and receivers of messages within the separate military society. While the military and the courts occasionally have argued that some senders are especially persuasive or that some receivers are especially susceptible to communication effects, they have never conceded that the reverse is possible. That is, they have never conceded the possibility that a soldier might be an ineffective communicator or that a person either might not receive a message or that it might not affect him.

In Parker v. Levy (1974), for example, the government argued that black soldiers under Levy's command might be "particularly susceptible to Captain Levy's arguments linking American involvement in Vietnam with racial suppression in the United States."⁸⁶ In addition, in that same case, the government argued political speeches by military officers attacking U.S. military policy

threaten civilian control of the military and that the threat increases with the rank of the dissenting officer.⁸⁷ In Secretary of the Navy v. Avrech (1974), the government argued for a court-martial on the grounds that the punishment of disloyal statements must depend, in part, on "the audience to which they were directed"⁸⁸ Avrech intended to address his anti-war statements to his fellow soldiers stationed at Da Nang in Vietnam in 1969. In fact, however, his statements were read only by a military mimeograph operator. In United States v. Daniels (1970), the Court of Military Appeals concluded that Daniels and Harvey's anti-war discussions presented a clear and present danger of impairment of loyalty and obedience among the troops because the soldiers who made up the audience were being trained for duty in Vietnam and did not want to be in the armed forces. The court concluded the soldiers were particularly "susceptible" to anti-war rhetoric.⁸⁹ In United States v. Gray (1970), the Court of Military Appeals expressed concern that the audience for the anti-war statements Gray wrote in his company's log book might be "somewhat receptive" to those statements. The court said that was suggested by log book entries about harassment by "lifers."⁹⁰ In United States v. Priest (1972), the Court of Military Appeals suggested soldiers must be mature in order to resist propaganda and that not all of them are.⁹¹

The courts also noted the greater persuasive powers of some speakers and some forms of communication. In Greer v. Spock (1976), Justice Powell, writing for the U.S. Supreme Court, suggested that face-to-face communication is more effective than communication through either the mass media or the mail.⁹² In United States v. Gray (1970), the Court of Military Appeals suggested that because Gray had a good service record, his anti-war statements would be taken seriously.⁹³ Also, Article 88 of the Uniform Code of Military Justice, which makes it a crime for officers to use "contemptuous" language about the President or a number of other government officials, and the government's non-judicial punishment of dissident commanders could be interpreted as evidence that the military views officers as more persuasive communicators than enlisted personnel. Yet the military and the courts never make that argument. Rather, they appear to hold officers to a higher standard of discipline as a

matter of military tradition. Again, the reverse argument – that enlisted personnel are less persuasive communicators than officers – was never articulated by the courts.

The description of the separate military society and the four assumptions about how communication works within that separate military society can be summarized in one model (See Exhibit A). In this model, the rectangle represents the boundaries of the separate military society, the context within which all military communication occurs. Within the separate military society, a soldier (S) and his commanding officer (C.O.) communicate a message (M) or messages to one another. Also, the soldier (S) communicates a message (M) or messages to another soldier (S) or soldiers. The solid arrows indicate the effects are powerful, direct, and predictable.

A Critical Analysis

There are substantial discrepancies between the communication process described by the traditional military communication model and its supporting assumptions and the communication processes described in the sociological, psychological, and communications literature. The first discrepancy, and it is a major one, is between the traditional view of the military as a separate society and the contention in the sociological and psychological literature, which sometimes is cited in dissenting opinions in the case law, that it is not.

This study is not the first to question the validity of the separate society rationale. Some of the literature suggests that if the military ever was a separate society, it is no longer. It has undergone civilianization, that is, the narrowing of the differences between it and civilian society. For example, military law scholar Edward F. Sherman has criticized judicial reliance on the separate society rationale as the basis for the civilian/military First Amendment dichotomy, arguing that the rationale is based on out-of-date stereotypes and ignores social science evidence.⁹⁴ Likewise, law professors Donald N. Zillman and Edward J. Imwinkelried argued in a law review article that changes

in the character of the military have discredited the separate society doctrine. They said,

The "society apart" was a valid description of the small 19th century, regular Army fighting Indians on the frontier. The description was still largely valid when forces stood garrison or shipboard duty in the 1930's. But by 1974 the military had become a multimillion-person employer involved in almost every aspect of American life.⁹⁵

Many critical analyses of the separate military society rely on sociologist Morris Janowitz's seminal research on Twentieth Century changes in weapons technology and their implications for the management of the military organization and systems of military discipline. Janowitz said Twentieth Century changes in weapons technology have largely civilianized the military. He said the military has adopted many of the bureaucratic characteristics of any large-scale, non-military organization, diminishing the need for strict military discipline.⁹⁶

To evaluate the separate society rationale more closely, it is helpful to analyze each of its five primary characteristics in light of what now is known about how the military society functions. The first characteristic of the separate military society is that it has the unique mission of waging war successfully. There is no serious debate about this in the literature. Even Janowitz was emphatic that the civilianization of the military that he described is a trend with necessary limits because of the military's unique mission of waging war.

The second characteristic of the separate military society is that because the threat of war is always imminent, the military cannot distinguish between combat and non-combat troops or between wartime and peacetime in matters affecting military efficiency. Whether the futures of the nation and the free world are perpetually in jeopardy is a national security issue outside the scope of this study. Even a cursory review of the case law, however, raises questions about the suggestion implicit in this characteristic of the separate military society that all disobedience, lowered morale, or divided allegiance impairs military efficiency. In case after case, the military failed to provide any evidence that the success of a military mission was jeopardized by servicemembers' expressive activities. Lieutenant Howe's participation in an anti-war rally in Texas is perhaps the best example of

disobedience that did not appear to impair military efficiency. No one in the crowd recognized him as a soldier until the military police arrested him.

Also in the separate military society, because the threat of war is always imminent, the military does not have time to allow the marketplace of ideas to work. This characteristic has not been analyzed in the literature. There has been no discussion of how long it takes the marketplace of ideas to work, that is, for conflicting ideas to be considered and for the truth to be discovered. Probably that is a never-ending process in which so-called truths are tested again and again, indefinitely. Thus the literature and case law that suggest civilian society can wait for the marketplace of ideas to work before making a decision or acting while the military cannot, have misstated the comparison. If the marketplace of ideas is a never-ending process, civilian society must and does make decisions before that process is completed, just as the military must. Therefore the military society does not appear to be distinctive in this regard.

The third characteristic of the separate society is that the military is a non-democratic organization in which instant and unquestioning obedience is both possible and necessary to the military mission. While the literature illustrates that this proposition is widely accepted in the military community, it also indicates that some legal scholars, sociologists, and psychologists question the military's need for strict discipline. The literature strongly suggests that the modern army may not need absolute obedience from its members, and that a system of discipline that demands absolute obedience might, in fact, be detrimental to the success of the military mission. As noted previously, the literature suggests that new weapons technologies may have reduced the military's need for strict discipline. Janowitz explained,

A military establishment which made use of close order formations, based on relatively low fire power, could be dominated and controlled by direct and rigid discipline. But since the development of the rifle bullet more than a century ago, the organization of combat units has been changing continuously, so as to throw the solitary fighter upon his own resources and those of his immediate comrades....

The technology of warfare is so complex that the coordination of a complex group of specialists cannot be guaranteed simply by authoritarian discipline. Members

of a military group recognize their greater mutual dependence on the technical proficiency of their team members, rather than on the formal authority structure.⁹⁷

Janowitz said that instead of shouting orders to be instantly obeyed, a modern military officer commanding specialists must rely on manipulation, persuasion, group consensus, and public relations techniques to maintain high levels of initiative and morale among the troops.⁹⁸ Also, he said, soldiers increasingly operate in "scattered and detached units, as opposed to the solid line of older formations."⁹⁹ In such units, each soldier must be able to do much more than obey orders. He or she must be able to improvise and make decisions.¹⁰⁰

Jay A. Miller, associate director of the Washington, D.C., American Civil Liberties Union (ACLU) office, testified during the unionization debate,

Reflexive and unthinking obedience to the commands of superiors is no longer considered desirable either from the standpoint of efficiency or legality. Intelligent response is now (since the Nuremberg trials) considered the goal of military training rather than blind reactions to others.¹⁰¹

The need for a new and more relaxed system of discipline to complement new weapons systems was observed as early as 1947 by World War II historian S.L.A. Marshall in Men Against Fire. He said increased fire power and widening deployments of combat forces had made individual initiative a more important quality in a soldier than obedience.¹⁰² Another scholar who has written about the reduced need for traditional military discipline in the modern army is Anthony Kellett, author of Combat Motivation: The Behavior of Men in Battle. Kellett observed that Twentieth Century armies that rely on small units have deemphasized training that emphasizes obedience and discipline, replacing it with training that emphasizes tactical flexibility and initiative.¹⁰³ Kellett added, however, that certain battle drills persist because they offer useful tactical guidelines, build teamwork, and counteract fear in battle.¹⁰⁴

Furthermore, some who have studied the military contend that griping – a form of dissent that could include the expression of opinions considered disobedient and forbidden by the UCMJ – is healthy for the individual soldier. They contend griping is an outlet for frustration that makes a

servicemember's life more bearable,¹⁰⁵ provides a means of establishing social contact with other soldiers,¹⁰⁶ prepares servicemembers to disobey illegal orders and therefore prevents war crimes,¹⁰⁷ and helps prepare soldiers to resist brainwashing, should they become prisoners of war.¹⁰⁸

Also, in his dissent in Brown v. Glines (1980), Justice William Brennan said,

Properly regulated as to time, place, and manner, petitioning provides a useful outlet for airing complaints and opinions that are held as strongly by citizens in uniform as by the rest of society. The forced absence of peaceful expression only creates the illusion of good order; underlying dissension remains to flow into the more dangerous channels of incitement and disobedience. In that sense, military efficiency is only disserved when First Amendment rights are devalued.¹⁰⁹

Thus the literature and the case law appear to suggest that some degree of obedience is necessary to the success of the military mission. At the very least, as ACLU Legal Director Melvin L. Wulf has observed, the military must impose sufficient discipline upon its troops "to compel men to risk their lives by exposing themselves to a hail of lead...."¹¹⁰ However, the literature also supports the conclusion that the need for obedience in the military is considerably less today than it once was, and, in fact, may be counterproductive to some degree. Strict discipline during training may fail to instill in soldiers the initiative and decision-making skills needed in small combat units.

Also, research suggests that absolute obedience on the part of all members of the armed forces is not possible, no matter how strict the command, because a multitude of variables appear to determine whether and how an individual is affected by a message. For example, the communication research of Melvin DeFleur and Sandra Ball-Rokeach suggests personality variables may determine a message's effect on an individual.¹¹¹ Likewise, a Swedish research group speculated that individuals have variable communication potentials, those characteristics and resources that enable -- or hinder -- an individual in sending and receiving communication. They said a person's communication potential is determined by his personal, social, and social system characteristics. These include his education, age, and primary group affiliations.¹¹²

The fourth characteristic of the separate military society is that soldiers are motivated to risk

their lives in battle because they are trained to obey orders and are instilled with absolute loyalty to their country and commanders. The sociological and psychological literature, however, strongly suggests those are not the reasons soldiers fight. The literature indicates soldiers most often are motivated to fight by the dynamics of their relationships within their small fighting units or with a single "buddy." The earliest research in this area was a study of World War II servicemembers conducted by a research team led by sociologist Samuel A. Stouffer and reported in four volumes entitled The American Soldier. That study reported that a survey of soldiers in Europe and the Pacific indicated that only one percent of enlisted personnel said leadership and discipline were their combat incentives. Those enlisted personnel said ending the task, solidarity with the group, sense of duty and self-respect, thoughts of home and loved ones, self-preservation, idealistic reasons, and vindictiveness, in that order, all were more important combat incentives.¹¹³ Approximately 15 percent of enlisted men and officers surveyed named group solidarity as their primary combat incentive. Soldiers did report, however, that they relied on the Army's hierarchic organization and rigid rules to overcome feelings of helplessness, stress, and confusion in battle.¹¹⁴

Another study of World War II soldiers, this one of the German Wehrmacht, was conducted by Janowitz and Edward A. Shils. They concluded that, contrary to popular belief, the extraordinary tenacity of the German soldier was generally not due to his strong National Socialist political convictions or any other social or political ideology. Rather, they concluded,

For the ordinary German soldier the decisive fact was that he was a member of a squad or section which maintained its structural integrity and which coincided with the social unit which satisfied some of his major primary needs. He was likely to go on fighting, providing he had the necessary weapons, as long as the group possessed leadership with which he could identify himself, and as long as he gave affection to and received affection from the other members of his squad and platoon.¹¹⁵

The importance of small group relationships to U.S. soldiers appears to have diminished since World War II. Roger W. Little's Korean War research indicated that a two-man relationship -- buddies -- was the basic unit of social cohesion during that conflict, not the squad.¹¹⁶ Little said the

squad was too widely dispersed due to modern weapons technology, and its personnel were rotated too rapidly to develop effective cohesion.

Some of the research on the American soldier in the Vietnam War suggests he had little meaningful involvement with any of his comrades because of the 12-month rotation system used during that conflict. In Crisis in Command: Mismanagement in the Army, Richard A. Gabriel and Paul L. Savage said the results of the isolation of American soldiers in Vietnam were a high rate of drug use, repeated attempts to assassinate officers, combat refusals bordering on mutiny, and skyrocketing desertion rates.

In addition, the sociological and psychological literature generally supports the view that a soldier's political beliefs do not affect his combat performance. Rather, the soldier is portrayed as a non-ideological creature who rejects and distrusts ideological rationales.¹¹⁷ For example, in a study of soldiers who deserted during the Vietnam War, D. Bruce Bell and Beverly W. Bell reported that they found no relationship between anti-war political ideology and desertion.¹¹⁸ A government study of Vietnam War deserters reported, "The deserter turns out to be the soldier who has not been integrated into society at large, into his family, or into his military unit."¹¹⁹ The study said half the deserters deserted because of "personal, family or financial problems," and only 12 percent deserted because they objected to the war.¹²⁰

At the congressional unionization hearings, pro-union witnesses argued that anti-union arguments were based on outdated theories of how soldiers are motivated to fight. Miller of the ACLU said unions would not undermine command authority:

These conclusions are premised on the now-outmoded view of the commander as a sort of pater familias who must command unquestioning and absolute loyalty in all matters from his subordinates. Behavior patterns in the armed forces today do not fit that model.... Modern man is often compartmentalized in loyalties, ideologies, and roles, and there is no reason that a service person's identification with a union for support as to prerequisites of employment needs to undercut the sense of duty and responsibility which the military rightly commands of its personnel.¹²¹

Miller said soldiers belong to many religious, fraternal, political, and public-action organizations without problems.¹²² Likewise, a soldier testified that soldiers are not motivated to fight by authoritarian discipline:

It sometimes appears that the opponents of unionization have gained their knowledge of the internal dynamics of the military through reading Beetle Bailey and Sergeant Rock comics. Enlisted men and women are neither buffoons, nor goldbricks, nor gorillas. Soldiers perform their duty when they have confidence in the honesty and support of their leaders. Ample studies, both military and civilian, have shown that authoritarian order and fear of punishment play little if any role in troop motivation.¹²³

Thus it is clear that the literature does not support the contention that soldiers fight either because they are ordered to do so or because they are loyal to their country or their commander. In most cases, the literature suggests, soldiers fight out of a sense of loyalty to their fellow soldiers. However, in only two military speech cases, both decided in the lower civilian courts, did the courts allude to such complex views of soldiers' motivations. In Stolte v. Laird (1972), a district court judge overturned the convictions of two soldiers court-martialed for distributing anti-war leaflets on a California Army base, saying,

As indicated earlier, mere anti-war thoughts or propaganda cannot be kept from military ears simply on the ground that the soldiers will be less highly motivated because of what they hear. Motivation is too intangible a concept to suffice to meet the directness required for a prejudice to order to override the First Amendment.¹²⁴

Also, dissenting in Carlson v. Schlesinger (1975), Judge David L. Bazelon of the D.C. Circuit Court of Appeals argued,

... American soldiers are not motivated by a pristine conception of the wisdom of governmental war policy. I think, and any society which truly believes in a First Amendment must assume, that soldiers like other citizens can disagree with governmental policy and yet still realize that they must follow the legal requisites of that policy, including military service, until the policy is changed by democratic means.¹²⁵

The fifth and final characteristic of the separate military society is that there is effective, two-way communication through official military channels. However, most of the literature supports the opposite conclusion, that there often is not effective, two-way communication through official military channels. Several researchers have concluded that the flow of information between the troops and their commanders and back again is very often inadequate to meet the needs of either. For example:

- * In his book Men Against Fire, Marshall dubbed the U.S. World War II forces "about the mutest army that we ever sent to war."¹²⁶ He said the lack of information from the top to the bottom of the military organization accounted for the fact that 75 percent of U.S. soldiers either did not fire their weapons or did not persist in firing and for several cases of battle-line panic.¹²⁷

- * In The American Soldier, Stouffer et al. reported that a survey of officers in World War II infantry rifle companies indicated that "inadequate communication with other companies and with higher headquarters" was a factor that negatively affected combat performance.¹²⁸ He also reported that half the soldiers surveyed said that at some time they had desired to complain to the Inspector General, whose official job is to handle complaints, but only one in five of those actually did so because of the red tape involved, feelings that the effort would be worthless, or fear of reprisal.¹²⁹

- * In Combat Motivation: The Behavior of Men in Battle, Kellett concluded that a lack of information passing from command to the troops often resulted in poor morale and rumors. He said that during World War II the troops sometimes were inadequately informed of their tactical situations, including what was expected of them.

- * Janowitz suggested informal, effective, downward channels of communication abound in the military because "official communications tend to lag timewise behind organizational needs."¹³⁰

- * Military historian Detlev F. Vagts expressed concern that official channels of bottom-to-top information are insufficient to bring to the top of the military or any organizational pyramid "data not in line with approved thinking."¹³¹

* At the congressional hearings on military unionization, one soldier testified that a union was needed to assist enlisted personnel in effectively registering complaints against their superiors. He charged that military commanders are "insulated from the troops by layers of bureaucratic yes-men who lack the guts to make waves or buck the system."¹³² He said commanders and enlisted personnel meet only in formal settings in which communication is limited to formalities, and almost all soldiers are either unaware of official procedures for registering complaints against superior officers or need assistance using those procedures.¹³³

Thus evidence is compelling that there is not effective, two-way communication through official military channels as the military and judicial description of the separate military society suggests.

In summary, the characteristic of the separate military that stands up best under close scrutiny is that it has the unique mission of waging war successfully. In this respect, civilian and military societies clearly differ. However, the literature suggests that not all armed forces personnel are a part of this mission. It also is clear that the military is not a democracy, but it is unclear to what extent it could operate democratically -- with increased protection for free expression -- and still successfully complete its unique mission. The literature suggests that the other three characteristics of the separate military society at least exaggerate reality. Thus it appears the separate society rationale may be based on a flawed understanding of military society. Military and civilian society appear to be much more alike than indicated in the case law.

To further critique the traditional military communication model and its underlying assumptions, it is illuminating to compare them to a model and a set of supporting assumptions that summarize what is known about how communication works, as well as to some of the dissenting opinions from military speech cases. The strongest critique is provided by the summary model and its assumptions, however, because the courts and lawmakers have seldom questioned traditional military views of the separate military society and military communication.

The summary model has been constructed to summarize the results of 40 years of model building by communication scholars. It is the product of a historical and critical review of two dozen models divided into the following classifications: stimulus-response, linear/mathematical, circular/dynamic, transactional, coorientation, sociological, and indirect effects.¹³⁴ In this summary model (See Exhibit B), each individual is depicted as both sender and receiver. Each individual sends and receives multiple messages to and from any number of other individuals simultaneously. Their interactions form a communication network the size of which is theoretically unlimited. The solid and dashed lines illustrate the variability of a message's effectiveness and effects. A message may affect one person one way, as depicted by a solid line, and affect a second person a different way, as depicted by a dashed line. Or there may be no effect, in which case there is no line between individuals. Furthermore, the communication takes place within a social context that influences the communication process. The social context, which has no definite limits, varies according to time and place for each individual. The communication process also is surrounded by noise.

Underlying the summary model are four assumptions about the nature of the communication process. Those assumptions are:

1. Communication is an on-going process with no beginning and no end. Every person communicates, and every person acts as both sender and receiver. Communication does not stop when people stop talking to one another.
2. The purpose of communication frequently is not persuasion. Other possible purposes include dissonance reduction and diversion, to name just two.
3. A wide range of effects is possible, and they may be direct or indirect, short or long-term, cumulative or noncumulative.
4. Each person has different sending and receiving skills. Also, people are affected by and/or react differently to a message, or they may not be affected and/or react at all. Therefore communication often is ineffective or has unplanned effects.

The differences between the traditional military and summary models and their underlying assumptions are both numerous and significant. At a glance, it is clear the summary communication model depicts a much more complex process than that depicted by the military model. The summary

model shows a network of persons who both send and receive, with varying degrees of success, a multitude of messages. The communication process operates in all directions simultaneously, and the network has no boundaries. On the other hand, the traditional military model depicts a linear communication model in which one person sends a message to another person who sends it along to a third person. That process takes place within the distinctive separate military society. Also, the communication effects in the summary model are depicted as variable or even nonexistent, whereas the traditional military model depicts communication effects as powerful, direct, and predictable.

The differences between the assumptions that support each of the models also are both numerous and significant. The first assumption underlying the military model is that communication is a discrete, linear process with a beginning and an end. It can be stopped. The parallel assumption for the summary model, however, is that communication is an on-going process with no beginning and no end. Everyone communicates, and every person acts as both sender and receiver. Communication does not stop when people stop talking to one another. This communication research-based assumption is echoed in the defense's brief to the U.S. Supreme Court in Secretary of the Navy v. Avrech (1974). The brief suggested that silencing Avrech, a soldier in Vietnam who tried unsuccessfully to have a written statement critical of the war mimeographed on a military base, would not stop the dissemination of his anti-war views. It said servicemembers might encounter Avrech's anti-war statements elsewhere, including in a book available at the base PX.¹³⁵

Another assumption underlying the military model is that the purpose of communication is usually persuasive. That implies that only the sender has a motive to communicate. The summary model, however, assumes the purpose of communication frequently is not persuasion and that receivers as well as senders have multiple motives for engaging in the communication process. For example, communications researcher Theodore M. Newcomb suggested that both senders and receivers communicate to maintain simultaneous orientations toward one another and toward an object in their environment.¹³⁶ Uses and gratifications research indicates receivers consciously use the mass media to

provide diversion, personal relationships, and personal identity.¹³⁷ However, none of the court opinions examined for this study suggest communication purposes other than persuasion.

A third assumption underlying the traditional military model is that communication has powerful, direct, and predictable effects. The summary model, however, assumes a wide range of effects is possible, and the effects may be direct or indirect, short or long-term, cumulative or noncumulative. Or there may be no effect at all. The idea that communication might have no effect or a weak effect is well established in the communication literature but appeared in military speech litigation in only one Supreme Court opinion and in two briefs to the Supreme Court -- always proffered by the losing side. Justice William O. Douglas wrote in his dissenting opinion in Secretary of the Navy v. Avrech (1974),

Talk is, of course, incitement; but not all incitement leads to action. What appellee in this case wrote out ... might, if released have created only revulsion. Or it might have produced a strong reaction. Conceivably more might have shared his views. But he was not setting up a rendezvous for all who wanted to go AWOL or laying a dark plot against his superior officers. He was attempting to speak with his comrades in arms about the oppressive nature of the way they were fighting. His attempt, if successful, might at best have resulted in letters to his family or Congressman or Senator who might have read what he said to local people or have published the letters in newspapers or made them the subject of debate in legislative halls.¹³⁸

In its brief to the Court in that case, Avrech's defense said servicemembers with whom Avrech discussed his anti-war views testified at his court-martial that hearing those views did not affect their conduct or their attitude toward the Marine Corps.¹³⁹ The brief argued that the government's "good order and discipline" rationale for curbing Avrech's First Amendment rights was "insufficient" because it "amounts to nothing more than 'undifferentiated fear or apprehension.' The government has produced absolutely no evidence to demonstrate that discussion of the Vietnam War by servicemen during their off-duty hours will interfere with discipline or cause servicemen to refuse to perform their mission."¹⁴⁰ The brief said it is "a disservice to our military personnel to presume that they would be so easily swayed rather than allowing for the possibility that they might readily reject the following of the views expressed and become strengthened in the view that the military is just."¹⁴¹ Likewise,

Levy's brief to the Supreme Court cited court-martial testimony of servicemembers who heard his statements but said those statements did not cause them to become disloyal, disaffected, hostile, or disobedient toward their commanding officers or the nation.¹⁴² It argued soldiers are not as easily swayed as the government believed.¹⁴³ Also, the fact the Levy was allowed to continue practicing medicine in the dermatology clinic for six months after charges were brought against him was presented as evidence that any danger he presented was "unpresent and unclear."¹⁴⁴

Also, in his analysis of cases in which military commanders were punished for unauthorized speech, Zillman said there was no evidence that the commanders' remarks lowered the morale or discipline of troops in Europe or Korea.¹⁴⁵ Furthermore, he said there was little chance their criticizing U.S. policy would undermine civilian control of the military because it already was widely known that dissent existed within American command circles.¹⁴⁶

The fourth assumption of the traditional military model is that the communication process works the same way regardless of who is communicating and regardless of the context in which the communication process occurs. The summary model, to the contrary, assumes innumerable and unpredictable variations in people's sending and receiving skills; the ways they are affected by messages, if they are affected by all; and the social contexts in which the communication process takes place. According to the summary model, all of these variables frequently cause the communication process to be ineffective or have unplanned effects.

The traditional military model closely resembles the pre-1940 stimulus-response communication model, which has been largely discredited by more recent communications research. According to the stimulus-response model, content is injected into the veins of the audience as if by a hypodermic needle. The audience then reacts in predictable ways. Like the military model, the stimulus-response model portrays individuals as fairly uniform creatures who all respond to a message in the same way. The stimulus-response model, like the military model, depicts the communication

process as a powerful process of persuasion. The summary model illustrates a much more complicated process in terms of the number of variables influencing communication and its possible effects.

Conclusions

The research presented here supports the conclusion that the military and civilian courts view military society as substantially different than civilian society and that they believe the differences between the two societies justify the differential application of the First Amendment to servicemembers and civilians. More specifically, the military and the civilian courts have used four legal rationales for curtailing the First Amendment rights of military personnel. Those rationales suggest that military speech must be curtailed if it threatens the political neutrality of the armed forces; servicemembers' loyalty and morale; strict order, discipline, and obedience in the military; or diplomatic relations. Furthermore, this research supports the conclusion that the courts believe that if servicemembers' expressive activities are allowed to interfere with those military interests, the military may be rendered incapable of waging war successfully.

The view of the military as a separate society and the four legal rationales used to curb free expression in that society suggest a communication model that depicts military communication as a discrete, linear process that can be stopped and the purpose of which usually is persuasive. According to the traditional military communication model, military communication has powerful, direct, and predictable effects. Also, the separate society rationale and four legal rationales suggest that all communicators have identical communication skills and that the communication process works the same way regardless of the context in which it takes place. In the case of military communication, the context is always the separate military society.

Despite the fact they are very widely accepted by the military courts, the view of the military as a separate society and the traditional military communication model used to curb the

expressive rights of servicemembers are only weakly supported by the most recent research on the nature of military society and how communication works. There is substantial evidence that the separate military society is not as separate from -- that is, different than -- civilian society as the military and the courts suggest. There also is substantial evidence that military communication does not work in the ways suggested by much of the legal literature and by the legal rationales used by the military and the courts to curb servicemembers' First Amendment rights.

The literature on communication models includes over two dozen different models, the more recent of which depict communication as a continuous process that works differently in different contexts and depict individual communicators as having variable communication skills. Modern models also indicate communication has an unpredictable variety of purposes and effects, or it may have no effect at all.

Furthermore, the sociological and psychological literature on military organizations does not suggest that communication works differently in military society than in civilian society. Rather, it supports the conclusion that military communication is multi-directional -- traveling both vertically and horizontally through the military hierarchy. It suggests military communication occurs through both official and unofficial channels and has a variety of effects, some beneficial to the military, some detrimental to it. Sometimes it has no effect.

Critical examination of the separate society rationale for curbing military First Amendment rights and a comparison of the summary communication model and the traditional military communication model suggest the civilian/military freedom of expression dichotomy, as it exists in the law today, should be altered to reflect the true nature of military society and the ways in which military communication really works. This research indicates that greater tolerance of servicemembers' expressive activities would neither jeopardize military efficiency nor hinder the military in the conduct of its unique mission of waging war. Research indicates that at least some of the military speech now proscribed by the UCMJ would have either harmless effects or no effects. Even

effects beneficial to the military mission are possible. More specifically, at least lone soldiers or soldiers speaking outside combat zones or out of uniform or off base might be allowed to speak without jeopardizing the military mission.

Freedom of expression is a cornerstone of our democratic society. Therefore, no segment of that society should be denied that right without compelling proof that such a denial is necessary. This research supports the conclusion that no such compelling proof exists for the degree of curtailment of expression existing in the military.

¹ Parker v. Levy, 417 U.S. 733 (1974).

² Ibid., p. 758.

³ For example, see S.L.A. Marshall, Men Against Fire (New York: William Morrow & Co., 2d printing, 1964). Marshall concluded that a lack of communication caused substantial numbers of Allied soldiers either to not fire or to fail to continue to fire their weapons during World War II.

⁴ For example, a sailor was court-martialed on two counts of printing and distributing an underground newspaper with intent to promote disloyalty to the United States. The Court of Military Appeals ruled against the sailor, expressing concern for the preservation of "a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself." United States v. Priest, 21 USCMA 564 (1972), p. 570.

⁵ Thomas I. Emerson, Toward a General Theory of the First Amendment (New York: Random House, 1966).

⁶ Those controversies involve the right of servicemembers to belong to labor unions, to engage in collective bargaining, and to strike; the right of servicemembers to belong to the Ku Klux Klan or similar extremist organizations and/or to participate in those groups' activities; and the right of military commanders to publicly disagree with military policy.

⁷ Karl Deutsch, "On Communication Models in the Social Sciences," Public Opinion Quarterly 16 (1952), p. 357.

⁸ Ibid., p. 360.

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¹² Ibid., p. 33.

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¹⁵ Joseph A. DeVito, The Psychology of Speech and Language: An Introduction to Psycholinguistics

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¹⁶ Parker v. Levy, p. 743, quoting United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), p. 17.

¹⁷ United States v. Voorhees, 4 USCMA 509 (1954), p. 532.

¹⁸ Atkins v. City of Charlotte, 296 F.Supp 1068 (W.D.N.C. 1969), p. 1076; and Vorbeck v. McNeal, 407 F.Supp. 733 (E.D.Mo. 1976), *aff'd* without comment 426 U.S. 943 (1976).

¹⁹ Deanne C. Siemer, Stephen A. Hut, Jr., and Gurden E. Drake, "Prohibition on Military Unionization: A Constitutional Appraisal," 78 Military Law Review 1 (1978), p. 40.

²⁰ U.S. Congress, House, Investigations Subcommittee of the Committee on Armed Services, Hearings on S.274, Unionization of Military Personnel, 95th Cong., 1st sess. (October 12, 13, 19, 26, 1977), p. 43. This is the testimony of Jon Minarik, director of the legislative liaison for the Public Service Research Council.

²¹ Ibid.

²² U.S. Congress, Senate, Subcommittee of the Committee on Armed Services, Hearings on S.857 and H.R.4080, The Uniform Code of Military Justice, 81st Cong., 1st sess. (April 27 and May 4, 9, 27, 1949), p. 138.

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²⁴ United States v. Voorhees, p. 531. In this case, a soldier was convicted of a breach of military regulations after he wrote a book critical of General Douglas MacArthur, the United Nations' supreme commander in Korea, and allowed it to be published without permission of the military.

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²⁶ Strom Thurmond, "Unions in the Military: No," AEI Defense Review (American Enterprise Institute for Public Policy Research 1, February 1977), p. 28.

²⁷ U.S. Congress, Senate, Subcommittee of the Committee on Armed Services, Hearings on S.857 and H.R.4080, the Uniform Code of Military Justice, p. 139.

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²⁹ Ibid., p. 533.

³⁰ Ibid., p. 532.

³¹ Greer v. Spock, 424 U.S. 828 (1976), p. 833, n. 3.

³² United States v. Daniels, 19 USCMA 529, 42 CMR 131 (1970); and United States v. Harvey, 19 USCMA 539, 42 CMR 141 (1970).

³³ Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971), *cert. denied* 404 U.S. 965 (1972), p. 225.

³⁴ U.S. Congress, Senate, Subcommittee of the Committee on Armed Services, Hearings on S.857 and H.R.4080, The Uniform Code of Military Justice, p. 140.

³⁵ Parker v. Levy, p. 744, quoting In re Grimley, 137 U.S. 147 (1890), p. 147.

³⁶ U.S. Congress, House, Investigations Subcommittee of the Committee on Armed Services, Hearings on S.274, Unionization of Military Personnel, p. 5.

³⁷ Ibid., p. 17.

³⁸ Cohen v. California, 403 U.S. 15 (1971), p. 24.

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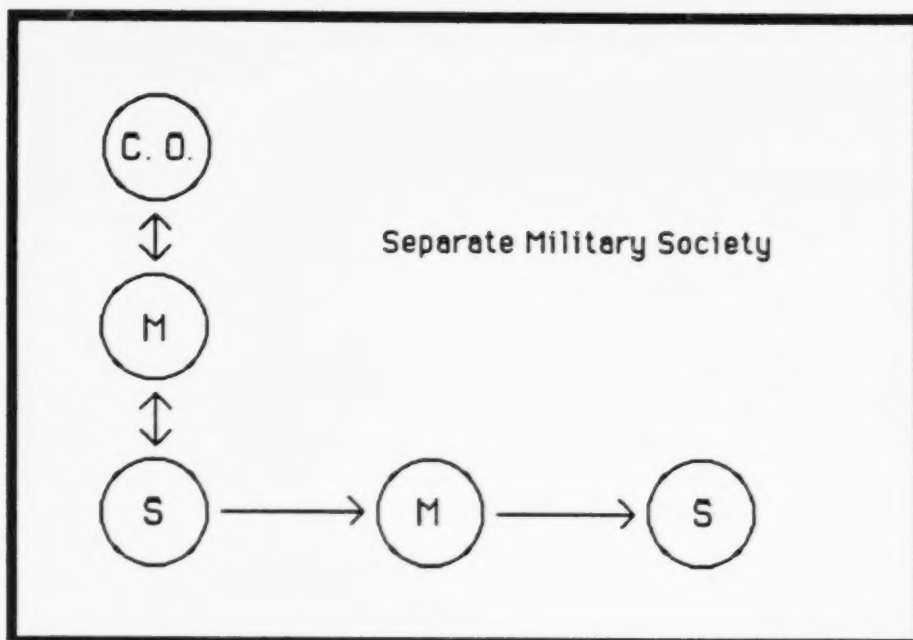
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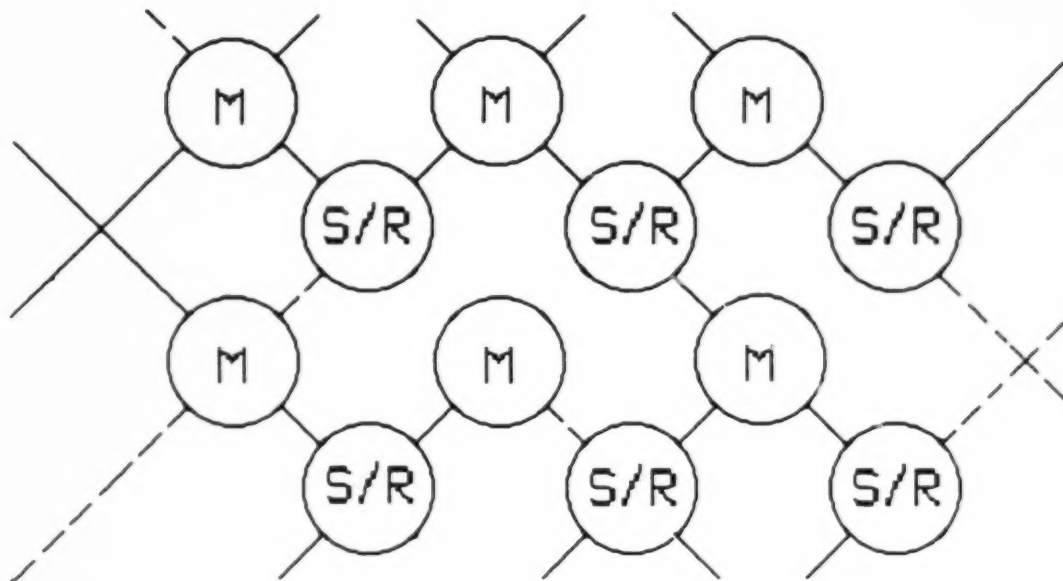
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Traditional Military Communication Model

Exhibit A



Summary Communication Model

Exhibit B